Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NOS 02-129-90 AND 02-130-90
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND MOHAMED YUSOFF SCJJ
26 DECEMBER 1990

Bankruptcy — Bankruptcy notice — Validity of — Claim for interest to date of actual realization — Claim not quantified — Bankruptcy notices null and void — Bankruptcy Act 1967, ss 3 & 131

In this case the respondent had given bankruptcy notices to the appellants, who were husband and wife, asking for payment within seven days of 'the sum of $612,065.07 together with interest to accrue thereon at the agreed rate of 13.25% pa as from 31 October 1984 to date of realization and $300 costs'. The learned judge found the petitions for bankruptcy, based on the bankruptcy notices, to be in order and granted receiving and adjudicating order against the appellants. The appellants applied to set aside the order on the ground that the bankruptcy notices were null and void but their application was dismissed. They appealed to the Supreme Court.

Held, allowing the appeal:
The sums required to be paid in both notices were ambiguous and uncertain resulting in the inability of the respondent bank to quantify them. The defect was not a formal one or a mere irregularity that could be cured by s 131 of the Bankruptcy Act 1967 or by r 274. Both the notices were void ab initio and non-compliance with them would not constitute an act of bankruptcy under s 3(1)(i) of the Bankruptcy Act 1967.

[Bahasa Malaysia summary

Di dalam kes ini responden telah memberi notis kebankrapan kepada perayu-perayu, suami dan isteri, meminta pembayaran di dalam masa tujuh hari 'jumlah wang $612,085.07 bersama bunga terakru pada kadar yang dipersetujui iaitu 13.25% setahun dari 31 Oktober 1984 hingga tarikh penjelasan dan kos $300'. Hakim yang arif telah berpendapat petisyen kebankrapan, berdasarkan notis kebankrapan itu, adalah mengikut peraturan dan beliau memberi perintah-perintah penerimaan dan perintah penghukuman terhadap perayu. Perayu telah memohon supaya perintah penerimaan dan perintah penghukuman itu diketepikan atas alasan notis kebankrapan itu adalah batal dan tak sah. Akan tetapi permohonan mereka telah ditolak. Mereka merayu ke Mahkamah Agung.

Diputuskan, membenarkan rayuan itu:
Jumlah wang yang perlu dibayar di dalam kedua-dua notis itu adalah kabur dan tidak jelas hingga menyebabkan responden tidak dapat memastikan jumlahnya. Kecacatan itu bukanlah kecacatan formal atau hanya suatu perkara luar aturan yang boleh dipulihkan oleh s 131 Akta Kebankrapan 1967 atau k 274. Kedua-dua notis itu adalah batal dan tak sah ab initio dan ketidakpatuhan dengannya tidak menimbulkan perbuatan kebankrapan di bawah s 3(1)(i) Akta Kebankrapan 1967.]

Cases referred to
1 *Low Mun* v *Chung Khiaw Bank* [1988] 1 MLJ 263 (folld)
2 *Re Ismail bin Daud and Hajah Qameriah bte Fateh Mohamed* [1989] 2 CLJ 1043 (refd)
3 *Lim Boon Peng* v *United Orient Leasing Co* [1991] 1 MLJ (folld)

Legislation referred to
Bankruptcy Act 1967 ss 3, 131
Bankruptcy Rules r 274

Appeal from: Bankruptcy Nos C4-43-4915-86 and C3-43-4917-86 (High Court, Kuala Lumpur)

Thangaraj a/l Balasundram for the appellant.
Ahmad Nazri Ibrahim for the respondents.

Cur Adv Vult

Mohamed Azmi SCJ (delivering the judgment of the court): Both these appeals were heard together as they involved an identical issue of law on the validity of the bankruptcy notices issued against a married couple ('the appellants') on 15 October 1986, and served on them by substituted service. The demand for payment in each case was in identical terms, and the act of bankruptcy relied upon by the respondent bank was the appellants' failure to comply within seven days of service with the requirements of the notices for payment of judgment debt, interests, and costs, as provided under s 3(1)(i) of the Bankruptcy Act 1967. The learned judge had found both the petitions for bankruptcy against the appellants in order, and accordingly granted a receiving and adjudicating order against the husband (Zulkifli) on 1 March 1989 and against the wife (Fawzia) on 3 May 1989. By notice of motion dated 11 December 1989, the appellants applied to set aside the receiving and adjudicating order on the ground that the bankruptcy notices were null and void ab initio for non-compliance with the provision of s 3(1)(i) and as such, the appellants had not committed any act of bankruptcy under that subsection. The learned judge concluded that the notices were not defective and dismissed their motion with costs.

In both these appeals, the requirements in the bankruptcy notices for payment within seven days were for 'the sum of $612,065.07 together with interest to accrue thereon at the agreed rate of 13.25% pa as from 31 October 1984 to date of actual realization and $300 costs'.

Before us counsel for the appellants repeated his argument in the High Court that whilst the judgment debt and costs were quantified in the notices, the demand for payment of interests was left at large from 31 October 1984 'to date of actual realization' at 13.25% pa. Relying on the decision of this court in *Low Mun* v *Chung Khiaw Bank Ltd*[1] which required judgment debt, interests and costs to be quantified, he argued that the notices served on both the appellants were null and void ab initio. He also referred to us the case of *Re Ismail bin Daud and Hajah Qameriah bte Fateh Mohamed*[2] at p 1051, where the same learned judge in annulling a bankruptcy notice as invalid and incapable of being saved by s 131 of the Bankruptcy Act 1967, had ruled:

> I hold that where in the body of the notice, to the ingredients for calculating the interest ordered, the words 'and

continuing' or other words of like effect are appended, that could amount to the demand being uncertain and as such bad.

By the same token, learned counsel urged us to conclude that the learned judge ought to have held the words 'to date of actual realization' in the body of the notices as equally bad in law.

The basis of an act of bankruptcy under s 3(1)(i) is non-compliance within seven days of service with a valid bankruptcy notice, requiring the debtor to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order. Unless ordered to be assessed by the registrar, the judgment debt is usually quantified in the judgment of the court, but invariably it is not so in the case of other sums ordered to be paid, such as interest and costs. Since the debtor is entitled to know exactly the actual sum that he has to pay to avoid the commission of the act of bankruptcy, it is essential that the notice must quantify the total sum required to be paid for the purpose of that particular bankruptcy notice. In these appeals, by leaving the amount of interest at large 'to date of actual realization', there is uncertainty in the actual amount due and payable which is required to be settled by the notices within seven days of service. As conceded by counsel for the respondent, at the date of their issue, no one knew if the whole interest ordered to be paid would be realized; let alone the date of actual realization. When the date of realization is questionable, and without any fixed date being supplied, the amount of interest required to be paid in the notices was equivocal and incapable of being quantified in accordance with the terms of the court order for bankruptcy purposes. We were not here concerned with the full amount of interest that the creditor would finally be entitled to under the terms of the judgment or order. That might be relevant at the petition or subsequent stage of bankruptcy proceedings. At the notice stage, what the credit should be concerned with was limited to the amount of interest in accordance with the terms of the court order that was due and payable as at the date of issue of the notice or at any earlier fixed date which was capable of being quantified for the purpose of s 3(1)(i).

In our view, the words 'in accordance with the terms of the judgment or order' in s 3(1)(i) qualify the words 'judgment debt' and as well as 'sum ordered to be paid', for which the court may, for instance order the judgment debt to be assessed by the registrar, or the costs to be taxed, or the interest to be paid for a particular period at a fixed yearly rate. So, it is not sufficient merely to reproduce the terms of the judgment or order in the body of the notice unless the judgment or order by its very terms has either by consent or otherwise quantified not only the judgment debt, but also the interest and costs. Further, as stated by this court in *Low Mun*[1] and *Lim Boon Peng* v *United Orient Leasing Co Bhd*,[3] all sums demanded to be paid should be capable of being made the subject of execution, which meant that the amount required to be paid in the notice must not only be due and payable at the date of issue of the notice but also that the execution thereon had not been stayed. Thus, it is wrong to include in the notice any sum which is not yet due and payable by the debtor as at the date of the issue of the notice. It is, in this connection, that we must reject the popular misconception that in all cases the amount claimed in the notice is said to be both quantifiable and quantified so long as the formula for calculation of interest ordered by the court is supplied. Invariably, the terms of the order on interest for the purpose of calculation are insufficient ingredients unless the time frame is supplied by the creditor, and not left open to an undeterminable date, bearing in mind that only interest which accrued and are payable can be made the subject of the notice under s 3(1)(i). Calculation of interest in accordance with the terms of the court order must of course be complied with, but such formula is of no assistance at all without the creditor supplying a fixed date up to which the interest have become due and payable for the purpose of the particular notice.

In the present appeals we found that by demanding interest 'from 31 October 1984 to date of actual realization', in the bankruptcy notices issued on 15 October 1986, the respondent bank had blatantly included first, a demand for payment of interest, a portion of which was not yet due and payable as at the date of the notice, and secondly, a demand for payment of interest for a period which was uncertain and undeterminable for the purpose of quantification in accordance with the terms of the court order.

Accordingly, we entirely agreed with the submission of counsel for the appellants that the sums required to be paid in both notices were ambiguous and uncertain resulting in the inability of the respondent bank to quantify them. We agreed that the defect was not a formal one or a mere irregularity that could be be cured by s 131 of the Bankruptcy Act 1967 or by r 274. Both the notices were void ab initio and non-compliance with them would not constitute an act of bankruptcy under s 3(1)(i).

We accordingly allowed both these appeals with costs by setting aside the receiving and adjudicating order and we also ordered the deposits to be refunded to the appellants.

Appeals allowed.

Solicitors: *Zainuriah & Thangaraj; Mohd Akhir & Partners.*

Reported by *Prof Ahmad Ibrahim*